

**United States Department of Labor
Employees' Compensation Appeals Board**

A.J., Appellant

and

**U.S. POSTAL SERVICE, HAMTRAMCK
FINANCE STATION, Hamtramck, MI,
Employer**

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**Docket No. 09-429
Issued: October 13, 2009**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 1, 2008 appellant filed a timely appeal from the November 12, 2008 decision of an Office of Workers' Compensation Programs' hearing representative, who affirmed the denial of her emotional condition claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether appellant met her burden of proof to establish that she sustained an emotional condition causally related to factors of her federal employment.

FACTUAL HISTORY

On April 3, 2008 appellant, then a 34-year-old sales and service clerk, filed an occupational disease claim alleging that on March 28, 2008 she first realized her anxiety and stress were employment related. She attributed her stress to the assignment of Gail Finley as her supervisor. Appellant stopped work on April 3, 2008 and has not returned.

The employing establishment submitted a copy of a July 20, 2007 investigation of appellant's use of sick leave under the Family and Medical Leave Act (FMLA) during June 2007. The investigation revealed that appellant had requested annual leave for June 11, 13 and 14, 2007 which was denied. She subsequently submitted a request under the FMLA for sick leave for this time period. Appellant's treating physician indicated that appellant was totally disabled from June 8 to 18, 2007 and was prescribed bed rest. The investigation revealed, however, that appellant had traveled to Las Vegas, Nevada during this period.

In a March 28, 2008 statement, Gloria Bailey, customer service supervisor, noted that on March 31, 2008 appellant voiced her disagreement with management's promotion of Ms. Finley to a 204B. Appellant related that she "felt threatened and unfair considering her past history with Ms. Finley." Ms. Bailey noted that appellant alleged that the employing establishment created a hostile work environment by the promotion. Ms. Bailey told appellant she had "no need of feeling threatened because she and Ms. Finley will always be in the presence of other [m]anagement during her tour." Appellant also asked Ms. Bailey why she could not be placed back in the finance unit instead of the annex.

In an April 2, 2008 statement, appellant noted tension and animosity with Ms. Finley, which was "well known by the supervisory and managerial staff, yet nothing is being done to intervene." She alleged that she was being tasked with more and more work and that the promotion of Ms. Finley would put her in greater contact. Appellant characterized her assignment to the annex as "a quick fix to a short[-]term problem." She requested a reassignment to finance for a stress free and safe working environment.

In an April 3, 2008 note, a physician's assistant diagnosed work-related stress and indicated that appellant was totally disabled. Appellant related that she was currently working under the supervision of a former coworker who had tried to get her fired. She advised that both her manager and supervisor were inattentive to her need to be removed from the stressful situation.

In disability certificates dated April 3 and 10, 2008, a physician's assistant indicated that appellant was totally disabled from work due to anxiety and job-related stress for the period April 3 to 20, 2008.¹

In a letter dated April 17, 2008, the Office informed appellant that the evidence of record was insufficient to support her claim. It advised her to submit additional medical and factual evidence to support her emotional condition claim.

In an April 23, 2008 report, Dr. Alberto Germino diagnosed adjustment disorder with depressed and anxious mood. Appellant related having increased work stress and that she had previously filed a grievance, been fired and was currently back at work.

¹ The disability note was on the stationary of Dr. Jagneswar Saha, a treating osteopath and Ph.D., but the signature is illegible with "PAC" noted at the end of the signature.

In an April 29, 2008 Equal Employment Opportunity (EEO) settlement agreement, the employing establishment agreed to appellant's work in the carrier annex from 8:00 a.m. to noon and at the finance section from noon until the end of her tour of duty.

On May 1, 2008 Dr. Jagneswar Saha, a treating osteopath and clinical psychologist, diagnosed anxiety and depression. He saw appellant on April 2008 for work-related stress. Appellant related that there was a coworker who was training to become a supervisor who did not get along with her and she was concerned that the coworker would get her fired. She reported that she had been unable to concentrate at work due to stress.

On June 11, 2008 the Office received EEO precomplaint counseling forms dated April 7 and 17, 2008 in which appellant alleged discrimination based on race, sex and retaliation for filing a prior EEO complaint. It also received a no fault November 21, 2007 EEO settlement agreement which reduced appellant's September 19, 2007 removal to a 14-day suspension. Appellant alleged that Alex Vaughn, manager customer service, was trying to get her fired by promoting Ms. Finley as her supervisor. She also alleged that Mr. Vaughn placed her in harms way and was subjecting her to a hostile work environment. Appellant alleged that both Ms. Bailey and Mr. Vaughn were setting her up to be in trouble before June 19, 2008, the date her file would be cleared. She also alleged a hostile work environment through the placement of Ms. Finley into her work environment.

On June 11, 2008 the Office received an undated statement from appellant and a June 3, 2008 response by Mr. Vaughn. Appellant reiterated her contention of being subjected to a hostile work environment as a result of Mr. Vaughn's decision to promote Ms. Finley. She noted that her request to be moved to the finance section was denied. Mr. Vaughn noted that appellant had been advised of her assignment to the carrier annex instead of the finance unit. He noted that both appellant and Ms. Finley worked in the same building beginning January 7, 2008 with no problems. Mr. Vaughn noted that appellant "never complained about Gail, she never stated to me or my staff she was under stress or that she had a problem with Gail until March 15, 2008 when Gail was given an opportunity to become a 204B." He had not met with appellant regarding her stress grievance. Mr. Vaughn noted that appellant was concerned with Ms. Finley having access to her social security number, the damage that could be done with this information and that Ms. Finley had previously attempted to get appellant fired.

In a June 23, 2008 response, appellant disagreed with Mr. Vaughn's June 3, 2008 letter. Although she and Ms. Finley worked in the same building as of January 2008, they did not see each other as they worked different schedules. Appellant alleged that Mr. Vaughn caused the stressful situation by making Ms. Finley a supervisor and changing their work schedules.

By decision dated July 11, 2008, the Office denied the claim, finding appellant did not establish a compensable factor of employment.

On July 24, 2008 appellant requested a review of the written record by an Office hearing representative.

In a September 30, 2008 e-mail, Mr. Vaughn denied any personal, hidden agenda or that he wanted to get appellant fired.

By decision dated November 12, 2008, the Office hearing representative affirmed the July 11, 2008 denial of her claim.

LEGAL PRECEDENT

To establish an emotional condition in the performance of duty, a claimant must submit the following: (1) medical evidence establishing that he or she has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to the condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to the emotional condition.²

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,³ the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under the Act.⁴ There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under the Act.⁵ When an employee experiences emotional stress in carrying out his or her employment duties and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability results from his or her emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of the work.⁶ A claimant must support his or her allegations with probative and reliable evidence. Personal perceptions alone are insufficient to establish an employment-related emotional condition.⁷

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under the Act.⁸ Where the evidence demonstrates that the employing establishment either erred or acted abusively in discharging its

² *Ronald K. Jablanski*, 56 ECAB 616 (2005).

³ 28 ECAB 125 (1976).

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *See Robert W. Johns*, 51 ECAB 137 (1999).

⁶ *Lillian Cutler*, *supra* note 3.

⁷ *Roger Williams*, 52 ECAB 468 (2001).

⁸ *Charles D. Edwards*, 55 ECAB 258 (2004).

administrative or personnel responsibilities, such action will be considered a compensable employment factor.⁹

For harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. Rather, the issue is whether the claimant under the Act has submitted sufficient evidence to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.¹⁰

Generally, complaints about the manner in which a supervisor performs his or her duties or the manner in which a supervisor exercises his or her discretion fall, as a rule, outside the scope of coverage provided by the Act. This principle recognizes that a supervisor or manager in general must be allowed to perform his duties and employees will, at times, dislike the actions taken. Mere disagreement or dislike of a supervisory or managerial action will not be compensable, absent evidence of error or abuse.¹¹ Absent error or abuse, the assignment of work is an administrative function of the employer and the manner in which a supervisor exercises his or her discretion falls outside the ambit of the Act.¹² Although the handling of leave requests and attendance matters are generally related to employment, they too are administrative functions of the employer and not duties of the employee¹³ and perceptions of unfair treatment are not enough to establish error or abuse. A claimant's own feeling or perception that a form of criticism by or disagreement with a supervisor is unjustified, inconvenient or embarrassing is self-generated and does not give rise to coverage under the Act absent evidence that the interaction was, in fact, erroneous or abusive. This principle recognizes that a supervisor or manager must be allowed to perform his or her duties and that, in performing such duties, employees will at times dislike the actions taken.¹⁴ A claimant must submit real proof that management did in fact commit error or abuse.¹⁵ In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.¹⁶

⁹ *Kim Nguyen*, 53 ECAB 127 (2001).

¹⁰ *James E. Norris*, 52 ECAB 93 (2000).

¹¹ *T.G.*, 58 ECAB ____ (Docket No. 06-1411, issued November 28, 2006).

¹² *Donney T. Drennon-Gala*, 56 ECAB 469 (2005).

¹³ *Joe M. Hagewood*, 56 ECAB 479 (2005).

¹⁴ *See Michael A. Deas*, 53 ECAB 208 (2001).

¹⁵ *L.S.*, 58 ECAB ____ (Docket No. 06-1808, issued December 29, 2006).

¹⁶ *Peter D. Butt, Jr.*, 56 ECAB 227 (2004).

ANALYSIS

Appellant has not attributed her emotional condition to the performance of her regular duties as a sales and service clerk or to any special work requirement arising from her employment duties under *Cutler*. Appellant's allegations primarily concern administrative or personnel matters. An administrative or personnel matter will be considered to be an employment factor only where the evidence discloses error or abuse on the part of the employing establishment.¹⁷ The mere disagreement or dislike of a supervisory or management action will not be compensable without a showing, through supporting evidence, that the incidents or actions complained of were unreasonable.¹⁸

Appellant alleged that she felt threatened by the promotion of Ms. Finley as a temporary supervisor in her work area. She contended that the promotion created a hostile work environment as management was aware of her prior history with Ms. Finley. Appellant also alleged that Mr. Vaughn was trying to get her fired, noting the change in both their work schedules.

Appellant submitted a copy of a June 28, 2008 EEO settlement agreement in support of her contention that the employing establishment erred in denying her request to be assigned to the finance section. The agreement provided that appellant would work from 8:00 a.m. to 12:00 p.m. in the carrier annex and 12:00 p.m. to the end of her duty tour in the finance section. The settlement agreement provided that it was not an admission of wrongdoing or liability by either party. This evidence does not find that the employing establishment erred or acted abusively in not granting appellant's request to be reassigned to work in the finance section. It does not establish a compensable factor of employment.¹⁹

Appellant expressed disagreement with management's decision to promote Ms. Finley as a supervisor. Ms. Bailey, a customer service supervisor, noted that appellant felt threatened by Ms. Finley's promotion due to their past history. Appellant also contended that it was unfair of management to promote Ms. Finley. As noted, mere disagreement or dislike of a supervisory or management action, however, will not be compensable without a showing, through supporting evidence, that the incidents or actions complained of were unreasonable.²⁰ Appellant has not submitted evidence to show how the promotion of Ms. Finley constituted error or abuse in an administrative action. Therefore, these allegations are not deemed compensable employment factors.

¹⁷ *M.D.*, 59 ECAB ____ (Docket No. 07-908, issued November 19, 2007); *Charles D. Edwards*, *supra* note 8.

¹⁸ *L.S.*, *supra* note 15; *Janice I. Moore*, 53 ECAB 777 (2002).

¹⁹ *D.L.*, 58 ECAB ____ (Docket No. 06-2018, issued December 12, 2006) (the record contained no EEO decision or settlement agreement containing findings of error or abuse by employing establishment personnel. Thus, the Board found the evidence insufficient to establish a compensable employment factor).

²⁰ *M.D.*, 59 ECAB ____ (Docket No. 07-908, issued November 19, 2007) (the Board has held that an administrative or personnel matter will be considered to be an employment factor only where the evidence discloses error or abuse on the part of the employing establishment).

Appellant alleged that she was discriminated against and subjected to a hostile work environment. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of her regular duties, these could constitute a compensable employment factor.²¹ However, for harassment and discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act.²²

Appellant submitted EEO precomplaint counseling materials dated April 7 and 17, 2008 and a November 21, 2007 settlement agreement which changed her termination to a 14-day suspension. She alleged discrimination based on race, sex and retaliation for filing a prior EEO complaint. Appellant also alleged that Mr. Vaughn was trying to get her fired by promoting Ms. Finley as her supervisor. The only evidence of record regarding this matter is appellant's statements and the EEO precomplaint counseling forms and settlement agreements. Appellant has submitted no witness statements to establish her contentions as factual. In assessing the evidence, the Board has held that grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.²³ There is no finding by EEO to establish error or abuse in the promotion of a coworker or in establishing appellant's contentions as factual. As noted, there is no factual evidence supporting her contention that she was subjected to a hostile work environment as a result of management's decision to promote Ms. Finley. Appellant therefore did not establish harassment or discrimination on the part of the employing establishment.²⁴ She identified no compensable work factors substantiated by the record.²⁵ Appellant therefore failed to establish a factual basis for her claim by probative and reliable evidence.

Appellant failed to establish that her emotional condition was causally related to a compensable factor of employment. Therefore, she has failed to meet her burden of proof.

CONCLUSION

The Board finds that appellant failed to establish that her emotional condition was causally related to a compensable factor of employment and, thus, has not met her burden of proof to establish an employment-related emotional condition.²⁶

²¹ *K.W.*, 59 ECAB ____ (Docket No. 07-1669, issued December 13, 2007); *Charles D. Edwards*, *supra* note 8.

²² *J.F.*, 59 ECAB ____ (Docket No. 07-308, issued January 25, 2008); *James E. Norris*, *supra* note 10.

²³ *David C. Lindsey, Jr.*, 56 ECAB 263 (2005); *Roger Williams*, *supra* note 7.

²⁴ *James E. Norris*, *supra* note 10.

²⁵ *Roger Williams*, *supra* note 7.

²⁶ Unless appellant alleges a compensable factor of employment substantiated by the record, it is unnecessary to address the medical evidence. See *J.C.*, 58 ECAB ____ (Docket No. 07-530, issued July 9, 2007); *Barbara J. Latham*, 53 ECAB 316 (2002); *Garry M. Carlo*, 47 ECAB 299 (1996).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 12, 2008 is affirmed.

Issued: October 13, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board